

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 18, 2013

v

LAURENCIO LEOPAULDO RODRIGUEZ,

Defendant-Appellant.

No. 307317
Shiawassee Circuit Court
LC No. 11-001979-FC

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, for which the trial court sentenced him to a term of 450 to 840 months' imprisonment. Defendant appeals as of right. We affirm.

Defendant's conviction arose from the July 2000 death of Rachel Scott, who was last seen alive on July 6, 2000. The victim's badly decomposed body was discovered on July 20, 2000, under a pile of brush in a wooded area. The manner or cause of death could not be determined. Although defendant was considered a suspect, the case remained unsolved for several years. In 2009, a witness came forward and implicated defendant in the victim's death. Physical evidence corroborated the witness's claim that defendant had placed the victim's body in the trunk of his car. A prison inmate also testified that defendant made statements implicating himself in the victim's death.

Defendant first argues that the trial court erred in denying his motion for a change of venue. We review the trial court's decision for an abuse of discretion. *People v Jendrzewski*, 455 Mich 495, 500; 566 NW2d 530 (1997). A trial court abuses its discretion when it selects an outcome that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

Generally, a defendant must be tried in the county where the crime was committed. *Jendrzewski*, 455 Mich at 499. The court may, however, change venue to another county for "good cause shown." MCL 762.7. "[E]xtensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted" constitutes good cause because the extensive publicity can adversely affect the defendant's right to an impartial jury. *Jendrzewski*, 455 Mich at 500-501. A change of venue may be appropriate in cases where there has been "extensive egregious media reporting, a barrage of inflammatory publicity

leading to a pattern of deep and bitter prejudice against the defendant,” “highly inflammatory attention to sensational details,” or “a carnival-like atmosphere surrounding the proceedings.” *People v Unger*, 278 Mich App 210, 254; 749 NW2d 272 (2008) (citations and internal quotation marks omitted).

The fact that defendant was arrested, charged, arraigned, and ordered to stand trial for the victim’s death so many years after she disappeared was the subject of local media attention. Although the accounts were not so numerous, sensational, and inflammatory as to warrant a finding that the entire jury pool was prejudiced against defendant to mandate an automatic change of venue, they contained enough information and inadmissible evidence to warrant extra caution in seating a jury. To this end, the trial court used questionnaires prepared by the parties to determine the prospective jurors’ knowledge of the case from media reports to assist in voir dire, a practice approved in *People v Tyburski*, 445 Mich 606, 623-624; 518 NW2d 441 (1994). The parties agreed that 19 potential jurors should be rejected out of hand and that the rest should be subjected to the usual voir dire, taking into account their answers on the questionnaires. During voir dire, the trial court and the attorneys separately questioned several potential jurors outside the presence of the other members of the venire, another practice approved in *Tyburski*, *id.* at 624. Using these methods, a jury satisfactory to both parties was seated. Of the 12 jurors who decided the case, six had not heard anything about the case, and the remaining jurors had seen a few articles, but knew little about the case and agreed that they could disregard what they had heard and decide the case based on the evidence. Given this record, the trial court’s decision to deny defendant’s motion for a change of venue was within the range of reasonable and principled outcomes and, accordingly, the court did not abuse its discretion.

Defendant next argues that he was denied his right to be present during a portion of the jury selection process. Because there was no objection to defendant’s absence during the pre-voir-dire conference and defendant did not otherwise raise this issue below, the issue is unpreserved. Accordingly, we review this issue for plain error affecting defendant’s substantial rights. *People v Buie (On Remand)*, 298 Mich App 50, 56; 825 NW2d 361 (2012).

A criminal defendant has a due-process right to be present during the proceedings “whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge” *United States v Gagnon*, 470 US 522, 526-527; 105 S Ct 1482; 84 L Ed 2d 486 (1985) (citation and internal quotation marks omitted). This right is also statutorily protected by MCL 768.3, which provides, in part, that “[n]o person indicted for a felony shall be tried unless personally present during the trial[.]” “A defendant has a right to be present during . . . any . . . stage of trial where the defendant’s substantial rights might be adversely affected.” *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984). For example, “[a] defendant has a right to be present during the voir dire, selection of and subsequent challenges to the jury, presentation of evidence, summation of counsel, instructions to the jury, rendition of the verdict, [and] imposition of sentence” *Id.*

A defendant may waive his right to be present by affirmative consent or by failing to appear when he is at liberty to do so. See, generally, *id.* at 248 (discussing jury views). A waiver consists of the intentional abandonment or relinquishment of a known right. *Buie*, 298 Mich App at 57. However, only the defendant can waive his due-process right to be present at his trial; defense counsel cannot waive the right on the defendant’s behalf. *People v*

Montgomery, 64 Mich App 101, 103; 235 NW2d 75 (1975). If the record is silent regarding the reason for the defendant's absence or whether he knew of his right to attend, there is no waiver because a waiver will not be presumed from a silent record. *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995); *People v Woods*, 172 Mich App 476, 479; 432 NW2d 736 (1988).

After members of the venire filled out the questionnaires, the trial judge, his clerk, the prosecutor, and defense counsel met to review the questionnaires. They tentatively selected 19 members of the venire for exclusion for "hardship, due to medical issues, or [because of] knowledge and state of mind regarding the case itself." Defendant was not present during that conference and the record does not explain the reason for his absence. However, defense counsel reviewed the questionnaires and proceedings with defendant afterward and defendant agreed on the record to excusing the persons tentatively selected for exclusion. The remaining venire members returned to court for jury selection and voir dire. A jury satisfactory to both parties was seated.

Assuming, without deciding, that defendant had a right to attend the pre-voir-dire conference, his absence does not, by itself, entitle him to relief. "[T]he test for whether [a] defendant's absence from a part of his trial requires reversal of his conviction is whether there was any reasonable possibility that [the] defendant was prejudiced by his absence." *Buie*, 298 Mich App at 59 (citation omitted). In *Buie*, this Court observed that "[t]he Michigan Supreme Court has also held that it is no longer the law that injury is conclusively presumed from defendant's every absence during the course of a trial." *Id.* (citation and internal quotation marks omitted).

Defendant does not explain how he was prejudiced by his absence from the conference. The purpose of the conference was to tentatively exclude from the jury-selection process those jurors deemed unsuitable for service based on their answers to questionnaires. Had defendant been present, he could have objected to those selected for exclusion or suggested additional persons as candidates for exclusion. However, the record discloses that defense counsel reviewed with defendant the questionnaires of the persons selected for exclusion and that defendant agreed to their exclusion, so it is not reasonably likely that defendant would have objected at the conference had he been present. Further, defendant had the opportunity to challenge any of the persons called back for jury selection through the usual voir-dire process. Moreover, defendant has not shown that any jurors who were not excluded during the pre-voir-dire conference should have been excluded, much less that they ended up serving on the jury. Therefore, defendant has not shown that any error affected his substantial rights. *Id.* at 56.

Defendant lastly argues that he was deprived of his right to the effective assistance of counsel. Because defendant did not raise an ineffective-assistance issue in the trial court, review of this issue is limited to errors apparent from the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish ineffective assistance of counsel, a defendant must "show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008). The defendant must also show that "the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich

App 702, 714; 645 NW2d 294 (2001). “Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel’s assistance was sound trial strategy.” *Horn*, 279 Mich App at 38 n 2. Under the “reasonableness” prong of the test,

a reviewing court must conclude that the act or omission of the defendant’s trial counsel fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission. [*People v Gioglio (On Remand)*, 296 Mich App 12, 22-23; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012).]

Defendant argues that counsel was ineffective because he failed to use remaining peremptory challenges to excuse certain jurors. “[A]n attorney’s decisions relating to the selection of jurors generally involve matters of trial strategy . . .” *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Defense counsel’s failure to challenge a juror generally does not constitute ineffective assistance of counsel due to the various factors that go into assessing a particular juror’s suitability. *People v Robinson*, 154 Mich App 92, 94-95; 397 NW2d 229 (1986). While defendant has cited concerns about certain jurors that could have warranted the exercise of a peremptory challenge, a review of the record shows that all indicated an ability to decide the case impartially, and thus it was not objectively unreasonable for counsel not to excuse them from the jury.

Defendant also claims that trial counsel was ineffective because he failed to object to defendant’s absence from the pre-voir-dire conference in which the juror questionnaires were reviewed. Because the purpose of the conference was to prescreen members of the venire and make a tentative decision regarding their fitness to serve, counsel reasonably may have determined that defendant’s presence was unnecessary, given that defendant would be involved in the actual decisions concerning whether those persons should be dismissed. Moreover, even assuming that counsel had objected and defendant had participated in the conference, there is nothing in the record to suggest that defendant’s participation would have affected the outcome of the proceedings. Thus, this ineffective-assistance claim cannot succeed.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Pat M. Donofrio